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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 205

ROBERT GRENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH W. WYATT
Attorney for Petitioner

WYATT, SALTZSTEIN & MOORE
1300 Wyatt Building
777 - 14th St., N.W.
Washington, D. C. 20005
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	4
Statement of the Case	4
Reasons for Granting the Writ	8
Appendix A—Opinion Below	1a
Appendix B—Order Denying Rehearing	2a
Appendix C—Petition for Rehearing	3a
Appendix D—Brief of Appellant	6a
Appendix E—Order Staying Mandate	19a
Appendix F—Judgment	20a
Appendix G—Constitution of the United States, Fifth Amendment; Constitution of the United States Sixth Amendment; Title 18, United States Code Annotated, Section 2314; Title 18 United States Code Annotated, Section 371; Title 18, United States Code Annotated, Section 473; Title 18, United States Code, Paragraph 2	21a

TABLE OF CITATIONS

CASES:

Brown v. Mississippi, 297 U.S. 78	9
Powell v. Alabama, 287 U.S. 45	9
Stern v. United States, 204 F. 2d 647	8
Turinetti v. United States, 2 F. 2d, 15	9
United States v. Hamrick, 293 F. 2d 468	8
United States v. Hartenfeld, 113 F. 2d 359	9
West, et al. v. United States, 113 F. 2d 168	10

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No.

ROBERT GRENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Robert Grene, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 3rd day of March, 1965, and the order of the same Court denying rehearing entered on the 2nd day of April, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37(b)(1)(2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 3rd day of March, 1965, (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

Petition for Extension of Time to File Petition for Writ of Certiorari was granted by an Order executed by The Honorable Hugo L. Black, extending the time for filing said petition for writ of certiorari to and including June 1st, 1965, dated on the 30th day of April, 1965.

QUESTIONS PRESENTED

I

Whether or not the Appellant, Grene, was denied due process of law by the denial of his motion for a continuance at the time of arraignment and the holding of his trial twelve days after arraignment.

II

Whether or not the Government having elected in the Indictment, and by the proof offered thereunder, to charge the Appellant Grene under the first paragraph of Section 2314 of Title 18, must prove value as required by that section.

III

Whether or not the Appellant Grene was properly convicted of transporting goods of the value of $5,000 when no proof whatever of value was adduced at the trial.

IV

Whether or not the Appellant Grene was denied due process of law when the trial judge permitted the witness, Savage, to testify as to the separate crime of forging United States Postal Money Orders (the charge for which had been severed) and denied Defense Counsel's Motion for a Mistrial.

V

Whether or not the Appellant Grene was denied due process of law when the Trial Court permitted him to be tried under an Indictment charging that Appellant Grene conspired to "transport and cause to be transported" when the section of the statute under which he was prosecuted does not contain this language.

VI

Whether or not the Appellant Grene was denied due process of law by an interpretation of Section 2 of Title 18 which gives to the phrase "offense against the United States", meaning "offense against the laws of the United States".

VII

Whether or not the Appellant Grene was denied due process of law by the actions of the Trial Court throughout the trial herein.

VIII

Whether or not with respect to Counts I and II, the Government proved the Appellant Grene guilty of the charges beyond, and to the exclusion of every, reasonable doubt when the only evidence presented was purely circumstantial.

IX

Whether or not the Court committed fundamental error in failing to instruct the jury on the law regarding the weight to be afforded to the testimony of admitted accomplices.

X

Whether or not the Appellant Grene was denied due process of law by being tried under an Indictment which included charges with which he was in no way connected.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; United States Constitution, Sixth Amendment; Title 18 United States Code Annotated, Section 2314; Title 18 United States Code Annotated; Section 473; Title 18 United States Code Annotated, Section 371; Title 18 United States Code Annotated, Section 2. Text of the same are set forth in Appendix G hereof.

STATEMENT OF THE CASE

Your Petitioner, Robert Grene, was accused jointly with two other defendants of violating certain sections of the United States Code. The Indictment contained Nine Counts, consisting of six pages. Count I of such Indictment charged a conspiracy under Title 18, U.S.C. 371, to commit offenses against the United States, to-wit, Title 18, U.S.C. 473 and Title 18, U.S.C. 2314. Count II charged a substantive violation of Title 18, U.S.C. 473. Count III charged a substantive violation of Title 18, U.S.C. 2314. Counts IV, V, VI, VII, VIII and IX were severed and are of no application in this petition.

The Indictment charging your Petitioner was issued on July 3rd of 1963. On July 5th of 1963 a warrant for the arrest of the Appellant, Robert Grene, was issued. Your Petitioner, Robert Grene, surrendered in open court on July 10th of 1963, and was arraigned.

At this time his attorneys immediately made an oral motion for continuance, which was denied. As result thereof, no pretrial motions of any description were filed. Particularly, no Bill of Particulars was sought, so that counsel could properly prepare their defense. No motion for severance was made, even though a Bill of Particulars would have furnished such grounds. This is borne out by the Court's subsequent action in dismissing part of the Indictment against your Petitioner Grene. No attack on the validity of the Indictment was made.

Trial of the case was set and commenced twelve days later, July 22nd of 1963, terminating on July 30th of 1963.

Thereafter, a jury trial was had and evidence was presented to the jury; a more complete and thorough statement of the evidence presented to the jury is contained herein in Appendix D.

Prior to submitting the case to the jury, the Trial Court decimated portions of Count I, the conspiracy count, by dismissing that portion of such count having to do with the transport and cause to be transported in interstate and foreign commerce from New York, New York, to Miami, Florida. The Trial Court further dismissed that portion of Count I against the Petitioner Grene as to a violation of Title 18, USC 473, as there was no evidence to show that your Petitioner Grene had any knowledge of the counterfeit $100 Federal Reserve notes.

Thus, the only remaining portion of Count I, the conspiracy count, that was submitted to the jury to determine your Petitioner's guilt or innocence was that section as follows: "to transport and cause to be transported in interstate and foreign commerce from Miami, Florida to Rio de Janeiro, Brazil, stolen securities, to-wit, Travelers Express Company Money Orders payable through Clark State Bank, Clark, New Jersey, of a value of $1,000,000, which said securities were stolen on December 28th of 1962 at Jersey City, New Jersey, the defendants knowing same to have been stolen."

The Trial Court likewise dismissed Count II of the Indictment, which was the substantive count involving the violation of Title 18, USC 473.

Count III was submitted to the jury. Count IV was dismissed.

Your Petitioner Grene was found Guilty by the jury as to Count I, as submitted, and Count III, and after adjudication of guilt, was sentenced to three years on each Count, to run concurrently.

In a normal manner the cause came on for oral argument before the United States Court of Appeals, and, thereafter, the opinion of the Court, Appendix A, was entered on the 3rd day of March, 1965, and, thereafter, a Petition for Rehearing was timely filed and subsequently the Court of Appeals entered its Order denying Rehearing, without opinion, Appendix B.

Present counsel for your Petitioner did not represent Petitioner Grene at his trial; nor in the Court of Appeals. Counsel did not enter this case until Petitioner's rights were exhausted at the Court of Appeals' level. A thorough review of the Indictment leads present counsel to the inescapable conclusion that had previous counsel thoroughly read Title 18, U.S.C. 2314, which is set out in detail in Appendix G, that no conviction of your Petitioner could have resulted.

Although it is alleged that the defendants herein did, in violation of Title 18, U.S.C. 2314, commit offenses against the United States, the only explanation in the Indictment in both the conspiracy count, Count I, and the substantive Count, Count III, was that, *"and more particularly, to transport and cause to be transported in interstate and foreign commerce from Miami, Florida, to Rio de Janeiro, Brazil, stolen securities, to-wit, . . . defendants knowing same to have been stolen."*

Title 18, U.S.C. 2314 is comprised of six separate paragraphs. It is obvious from reading such section in its entirety, reading the Indictment, and reading the Judge's Instructions to the Jury, that the Government relied solely on the first paragraph, which is quoted as follows:

> "Whosoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, *of the value of $5,000 or more;*—(Emphasis supplied)—knowing the same to have been stolen, converted or taken by fraud."

At no place in the Indictment, or in the Trial Court's Instructions to the Jury is any reliance attempted by the Government upon the third paragraph of Title 18, U.S.C. 2314, which states as follows:

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or."

Present counsel have searched the entire record and have found that it is an uncontested fact that the described Travelers Express Company Money Orders were stolen by person or persons unknown while in a blank form. Said money orders were transported to Miami while still in such blank form.

No evidence of any type was introduced by the Government to establish that such money orders had a value of $5,000 or more, and no other section of Title 18, U.S.C. 2314 is quoted in the Indictment or in the Instructions of the Trial Court to the Jury.

At best, the actual value of such blank stolen money orders could not have exceeded the cost that the Texas Company was charging the Travelers Express Company for furnishing such money order blanks.

All known cases are unanimous that it is imperative upon the Government to prove that the stolen goods, in this case the blank money orders, had a value of $5,000, or more. The value of transported goods is an essential element of offense charged under statute prohibiting interstate transportation of stolen goods of a value in excess of $5,000, and conviction can not be sustained in absence of proof of value. *United States* v. *Hamrick,* 293 F. 2d 468.

Under Title 18, U.S.C. 2314, the true market value to be applied is the market value at the time and place of taking. *Stern* v. *United States,* 204 F. 2d 647.

In order to sustain this conviction, it would have been necessary for the Indictment to allege sufficient facts to come under Paragraph 3, hereinbefore quoted, of Title 18, U.S.C. 2314. Likewise, Instructions to the Jury in conformity to such allegation in the Indictment should have been appropriately made.

It is the contention of current counsel that this is an illustration that trial counsel did not have sufficient time to adequately prepare their case in accordance with trial counsel's representation to the Court at the time of arraignment, and that, if trial counsel had had adequate time for a thorough review of the Indictment and of the Federal laws under which such Indictment was drawn, proper motions could have been made so that your Petitioner would have had a trial which would have protected him from double jeopardy at a subsequent time.

Petitioner likewise refers this Honorable Court to the other issues which have been raised under the caption, "Questions Presented."

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by the Petitioner should be granted for the reason that the Constitution of the United States, specifically, the Sixth Amendment, nowhere specifies any period of time which

must intervene between the required appointment of counsel and trial. Many cases, including several decisions of this Court, have held that under certain circumstances a defendant was denied his Constitutional rights when the interval of time between appointment of his counsel and trial was a minimal length of time. *Powell* v. *Alabama*, 287 U.S. 45; *Brown* v. *Mississippi*, 297, U.S. 78; *Turinetti* v. *United States*, 2 F. 2d, 15.

Likewise, in many cases, Circuit Courts of Appeal have made varying decisions, such as sixty days is sufficient time for counsel to prepare a defense. *United States* v. *Hartenfeld*, 113 F. 2d, 359.

The Court of Appeals' decision in the case at bar held below:

> "In the absence of any showing of prejudice resulting from the holding of trial twelve days after arraignment, we can determine that the Trial Court erred in denying the Motion for Continuance."

It is Petitioner's contention that the prejudice is demonstrated from the record in that:

1. A Motion for a Continuance was made at the time of arraignment. This motion was denied. As a result thereof, the Defendant had to secure counsel almost immediately without an opportunity to select counsel experienced in trial of cases of this nature. Furthermore, the counsel he did retain was also counsel for another defendant. In all cases of conspiracy, there is bound to come a point in the trial where a conflict of interest will arise.

2. No preliminary motions of any type were filed, thus allowing a jury to listen to evidence of other crimes in determining the guilt or innocence of your Petitioner. This was not cured by the trial courts dismissing certain portions of Count I and dismissing Count II.

3. Counsel did not have time to adequately prepare their case and study all the decided cases in a complex field of law. (See facts stated in Statement of the Case.)

It is respectfully submitted that the writ sought by your Petitioner should be granted for the reasons stated by the Fifth Circuit of *West, et al* v. *United States,* 113 F. 2d 168, is in direct conflict with the Order of the Fifth Circuit in the case at bar in denying Petitioner's Petition for Rehearing, without opinion. This decision held:

> "It is well settled that in the Courts of the United States a conviction may be sustained by the evidence of an accomplice, but the judge should charge the jury as to the weight to be given to the testimony."

It is respectfully submitted that the writ sought by your Petitioner should be granted for the reasons that the decisions of the Fifth Circuit of several cases cited in Paragraph 3 of Petitioner's Petition for Rehearing, Appendix C herein, are in direct conflict with the Order of the Fifth Circuit in the case at bar in denying Petitioner's Petition for Rehearing, without opinion (Appendix B).

It is respectfully submitted that the writ sought by your Petitioner should be granted for the adidtional reason covered in Paragraph 2 of Petitioner's Petition for Rehearing in the Court of Appeals (See Appendix "C" herein), as the decision of the Fifth Circuit in the case at bar is in conflict with cases there cited.

It is further respectfully submitted that the Fifth Circuit erred in its Order, in its Opinion, (Appendix A.), in deciding the points more fully raised in the brief attached herein and made a part of the writ for certiorari as Appendix D.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying

the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

JOSEPH W. WYATT
Attorney for Petitioner

WYATT, SALTZSTEIN & MOORE
1300 Wyatt Building
777 - 14th St., N.W.
Washington, D. C. 20005
Of Counsel

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21049

VINCENT ROBERT NAPOLI a/k/a JIMMY NAPOLI AND ROBERT GRENE,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(March 3, 1965.)

Before TUTTLE, Chief Judge, GROOMS and MCRAE, District Judges.

PER CURIAM. There was ample evidence as to each of the appellants to sustain the verdict of the jury and judgments of conviction.

In the absence of any showing of prejudice resulting from the holding of trial twelve days after the arraignment of Grene, we can not determine that the trial court erred in denying the motion for continuance.

No exceptions having been made to the charge as given by the trial court, we find no reversible error in the failure of the court to give a specific charge on the accomplice testimony in view of the adequacy of the charge as a whole.

The judgment is AFFIRMED:

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,049

VINCENT ROBERT NAPOLI a/k/a JIMMY NAPOLI AND ROBERT GRENE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Filed April 2, 1965

Appeals from the United States District Court for the Southern District of Florida

(April 2, 1965)

On Petitions for Rehearing

Before TUTTLE, Chief Judge, GROOMS and MCRAE, District Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed separately by Napoli and Grene in the above styled and numbered cause be, and the same is, hereby DENIED.

Court Rule

RULE 32

ISSUANCE OF MANDATE

Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the

mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

VINCENT ROBERT NAPOLI a/k/a JIMMY NAPOLI AND ROBERT GRENE,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

No 21,049

Petition for Rehearing

Comes now the Appellant Robert Grene, by and through his undersigned attorney and respectfully petitions this Honorable Court for a rehearing herein, and as grounds respectfully submits unto the Court the following.

1. That this Honorable Court has failed to consider the question of whether or not the Appellant was denied due process of law by the denial of his motion for a continuance at the time of surrender and arraignment, and the holding of his trial twelve (12) days later in the cases of

U. S. v. *Wight*, 2nd Cir., 176 F.2d 376
Everitt v. *United States*, 5th Cir., 281 F.2d 424

and the Constitution of the United States Amendment Amendment VI and further in the light of the general recognition by the Bar of this Country that even the most able, experienced practitioner of the law cannot

prepare an adequate and property defense in a criminal matter containing nine (9) counts and twelve (12) overt acts in the space of twelve (12) days.

It is respectfully suggested and alleged that the situation set forth above is prejudicial on its face and denies the Appellant due process of law and the right to have the assistance of counsel for his defense.

2. That this Court has failed and overlooked the argument set forth by the Appellant that he was denied due process of law by the actions of the trial court throughout the trial and that the record herein, on its face, shows that the Appellant has been denied due process of law required by the Constitution of the United States Amendment V. Appellant respectfully sets forth in support of this position and contention the cases of:

Baker v. *United States*, 5th Cir., 156 F2d 386
Gomila v. *United States*, 5th Cir., 146 F2d 372
Hunter v. *United States*, 5th Cir., 62 F2d 217
Adler v. *United States*, 5th Cir., 182 F 464
United States v. *Standard Oil Company*, 7th Cir., 317 F2d 884
United States v. *Ah Kee Eng*, 2nd Cir., 241 F2d 157

3. That this Court has failed to consider, or has overlooked the contention that the evidence herein was purely circumstantial and does not exclude every reasonable hypothesis other than guilt. This Court has consistently held that the test in circumstantial evidence cases is whether the inferences which could have been reasonably drawn from the evidence were not only consistent with guilt, but whether they were inconsistent with every reasonable hypothesis of innocence.

Bryan v. *United States*, 5th Cir., 175 F2d 223, aff'd 338 U.S. 552, 70 S. Ct. 317, 34 L. Ed. 335, rehearing denied 338 U.S. 957, 70 S. Ct. 491, 94 L. Ed. 590
Crane v. *United States*, 5th Cir., 148 F2d 615

Williamson v. *United States*, 5th Cir., 332 F2d 123
Thomas v. *United States*, 5th Cir., 239 F2d 7
Wise v. *United States*, 5th Cir., 241 F2d 345
United States ex rel Argento v. *Jacobs*, 175 F. Supp. 877
Knight v. *United States*, 5th Cir., 279 F2d 675 cert. den'd 370 U.S. 923, 82 S. Ct. 1565, 8 L. Ed. 2nd 503

4. That this Court has failed to consider or has overlooked the proposition that the fair administration of justice requires a specific charge on accomplice testimony, notwithstanding any other charges that are given, and that no exception need be made by counsel for the Appellant upon the conclusion of the charges with respect to the failure to give a charge on accomplice testimony, inasmuch as this failure to so charge would constitute fundamental error. In support of this contention, Appellant respectfully cites the cases of:

Surratt v. *United States*, 269 F2d 240, 106 U.S. App. D. C. 49
McQuald v. *United States*, 195 F2d 987, 91 U.S. App. D. C. 229 cert. den'd 344 U.S. 929, 73 S. Ct. 499, 97 L. Ed. 715
Brickey v. *United States*, 8th Cir. 123 F2d 341
United States v. *Tarricone*, 2nd Cir. 242 F2d 555
Ward v. *United States*, 5th Cir., 296 F2d 898
West v. *United States*, 5th Cir., 113 F2d 68, Cert. den'd 311 U. S. 647, 61 S. Ct. 33, 85 L. Ed. 413
Peel v. *United States*, 5th Cir., 316 F2d 907
Lyles v. *United States*, 5th Cir., 249 F2d 744
Phelps v. *United States*, 5th Cir., 252 F2d 49, 52

Respectfully submitted this 15th day of March, 1965.

Attorney for

BERNARD BERMAN,
Attorney for Appellant Robert Grene
1440 79th Street Causeway,
Miami Beach, Florida, 33141

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

VINCENT ROBERT NAPOLI a/k/a JIMMY NAPOLI AND ROBERT GRENE,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

No 21,049

On Appeal from the United States District Court for the Southern District of Florida

Brief of Appellant Robert Grene

SUPPLEMENTAL STATEMENT OF THE CASE

The indictment against the Appellant, Robert Grene, was issued on July 3rd, 1963. On July 5th, 1963, a warrant for the arrest of the Appellant, Robert Grene, was issued, and on July 10th, 1963, the Appellant, Robert Grene, surrendered in open Court and was arraigned, his motion for continuance being denied at the time of arraignment. A trial of this cause was commenced on July 22nd, 1963 and terminated on July 30th, 1963.

A prior indictment against the other two defendants in this cause was issued February 1st, 1963. The indictment herein and the prior indictment were the same as the counts on which all the defendants were tried, and as to these counts the only change was the naming of the Appellant, Robert Grene, as an additional defendant.

SUPPLEMENTAL STATEMENT OF THE FACTS

At the outset it is to be noted that the Statement of Facts set forth in the Government's brief does not present the facts in a clear, concise and accurate manner. The evidence and testimony does not completely support all of the statement of facts set forth in the Government's brief.

Appellant, Robert Grene, first met Eldred Altman Reames in the Fall of 1962 (TS-59; TR-563.) At that time a discussion was held relative to land in Brazil (TR-59, 60; TR-563-564). In October, 1962, Appellant, Robert Grene, and Reames reached an agreement relating to the construction of 10,000 homes on the Reames property in Brazil (TR-354, 355; TR-565). At the request of Reames, Appellant, Robert Grene, submited a proposal to a firm in Atlanta, Georgia; nothing came of this submission (TR-564). Appellant, Robert Grene, then introduced defendants, Napoli and Ross to Reames (TR-60; TR-357; TR-357; TR-568); the defendant, Napoli, being a builder who had engaged in extensive consrtuction work in the Miami area, and the defendant, Rosa, representing that he had funds available to finance the transaction (TR-60; 61; TR-521). Reames had previously referred the Appellant, Robert Grene, to an insurance agency for the purpose of obtaining a commitment for funds for the project (TR-566), and Appellant, Robert Grene, had received a letter and telegram on that matter (TR-532, 533; TR-566). The conditional commitment required insurance coverage or guarantee from Lloyds of London or similar institution (TR-533; TR-566). This coverage or guarantee was never obtained.

Reames was to receive fifty (50%) per cent of the profit from his transaction with Napoli and Rosa (TR-64); Appellant, Robert Grene, was to be given forty (40%) per cent of Reames profit from the land transaction as a finder's fee (TR-64.)

The parties met for the first time on or about the 1st or 2nd day of January, 1963 on a boat docked behind Reames' house (TR-353). During the discussion held at this time, Reames' son came aboard the boat and showed Appellant, Robert Grene, and Napoli through the boat while Reames was talking to Rosa (TR-392; TR-570). Reames testified that Appellant, Robert Grene, had no knowledge of the $160,000.00 in money orders (TR-523).

At the time Savage was signing the money orders there is a direct contradiction in his testimony as to whether or

not Appellant, Robert Grene knew what he was doing (TR-215; TR-279), or even saw him signing the money orders, and whether or not he even saw Grene; the Appellant, Robert Grene, testifying that he never saw the money orders at any time (TR-577) and that he never saw Savage signing the money orders or anything else (TR-583).

Points Involved

I. Whether or Not the Appellant, Grene, was Denied Due Process of Law by the Denial of His Motion for a Continuance at the Time of Arraignment and the Holding of His Trial Twelve (12) Days After Arraignment.

II. Whether or not the Appellant, Grene, was Denied Due Process of Law by the Actions of the Trial Court Throughout the Trial Herein.

III. Whether or Not, With Respect to Counts I and II, the Government Proved the Appellant, Grene, Guilty of the Charges Beyond and to the Exclusion of Every Reasonable Doubt When the Only Evidence Presented was Purely Circumstantial.

IV. Whether or not the Court Committed Fundamental Error in Failing to Instruct the Jury on the Law Regarding the Weight to be Afforded to the Testimony of Admitted Accomplices.

ARGUMENT

POINT I.

Whether or not the Appellant, Grene, was Denied Due Process of Law by the Denial of His Motion for a Continuance at the Time of Arraignment and the Holding of His Trial Twelve (12) Days After Arraignment.

It is the position of the Appellant, Grene, that he was effectively denied his Constitutional right to due process of law by the trial court's refusal to grant his motion for a

continuance, and requiring him to be tried twelve (12) days after his arraignment. It stands as a matter of general recognition by the Bar of this Country that it is impossible for even the most able, experienced practitioner of the law to prepare an adequate and proper defense in a criminal trial on an indictment involving nine (9) counts and twelve (12) overt acts in the space of twelve (12) days.

The Constitution of the United States, Amendment VI, provides in part:

> "In all criminal prosecutions, the accused small . . . have the assistance of counsel for his defense.

The Courts have held that the right to competent counsel encompasses the fact that counsel must have sufficient and adequate time to prepare the case, and be familiar with the law involved.

U. S. v. *Wight,* 2nd Cir., 176 F2d 376

The denial of adequate time to prepare a case on behalf of a defendant violates the provisions of the Constitution of the United States, Amendment V, which provides in part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

In a case arising in this Circuit it was held that where counsel was appointed by the Court in the April term and trial was held on June 8th of the same year there was not adequate time for the attorney to prepare a proper defense and the Court committed fundamental error in denying motion for continuance.

Everitt v. *United States,* 5th Circuit, 281 F2d 429.

Applying the law as set forth to the instant case, and the general knowledge of this Honorable Court with respect to the time necessary for even the most able, experienced practitioner of the law to adequately and competently prepare for trial, it is immediately apparent that

the trial Court committed fundamental error in denying the Appellant, Grene's motion for a continuance. The denial of the motion denied to the Appellant, Grene, the privileges and immunities granted to him under Amendment V and Amendment VI of the Constitution of the United States.

POINT II.

WHETHER OR NOT THE APPELLANT, GRENE, WAS DENIED DUE PROCESS OF LAW BY THE ACTIONS OF THE TRIAL COURT THROUGHOUT THE TRIAL HEREIN.

It has been held on any number of occasions that where the trial judge, by his actions, though inadvertent, actively participates in the trial so that an impression is conveyed to the jury of the guilt of the defendant, the defendant has been denied his privileges and immunities under the Constitution of the United States, Amendment V.

This Court has held:

> "We are committed to the view that it is of the essence of a fair trial that the judge conduct it with complete disinterestedness, and that if he fails to do so, the judgment will be reversed."
> *Baker* v. *United States*, 5th Circuit, 156 F2d 386

See also:

> *Gomila* v. *United States*, 5th Cir., 146 F2d 372
> *Hunter* v. *United States*, 5th Cir., 62 F2d 217
> *Adler* v. *United States*, 5th Cir., 182 F 464

In the Gomila case, supra, it was held that the trial court should not examine the witnesses in such a way as to prejudice the defense, and that to do so is patent error on the face of the record which can be recognized by the Appellate Court even where there was no objection in the trial court.

In the case of:

> *United States* v. *Standard Oil Comyany*, 7th Cir., 317 F2d 884

the trial judge asked questions, the overwhelming majority of which were useful to the prosecution, and further volun-

teered objections and gratuitously struck testimony so as to aid the prosecution. The Appellate Court held that this action, while unintentional, conveyed to the jury the impression that the judge believed the defendant guilty, and that, therefore, the defendant was deprived of a fair trial.

It is elementary that the trial judge must, at all times, be aware and always remember that the jury is always attentive to his words, attitude and demeanor and that he can influence the jury, though inadvertent, by his actions throughout the trial.

In the case:

United States v. *Ah Kee Eng,* 2nd Circuit, 241 F2d 157

the judge in the trial court exhibited an attitude of impatience and annoyance to proper objections and interruptions as if they were capricious, absurd or unnecessary. He also made gratuitous comments disparaging defense counsel and the defense. The Court held that such repeated indications of displeasure and indications of a nature to indicate that the judge thinks little of what counsel is doing is prejudicial and denies the defendant a fair trial.

Also see:

Edgington v. *United States,* 10th Cir., 324 F2d 491

In the instant case the trial judge injected many remarks (TR-51, 103, 112, 142, 157, 158, 165, 169, 192, 255. 256. 281. (TR-51. 103. 112. 142. 157, 158, 165, 169, 192, 255, 256, 281, 290, 291, 317, 318, 319, 321, 345, 356, 361, 368. 371. 372. 290. 291. 317. 318. 319. 321. 345, 356, 361, 368, 371, 372, 386, 390, 420, 437, 438, 439, 448, 457, 469, 474. 477. 482. 386. 390. 420. 437. 438. 439. 448, 457, 469, 474, 477, 482, 486, 488, 490; 500, 502, 504, 505, 506, 507, 514. 518. 519. 486. 488. 490. 500. 502. 504. 505, 506, 507, 514, 518, 519, 521, 527, 539, 555, 567, 576, 577, 578, 582, 588. 601. 602.

521. 527. 539. 555. 567, 576, 577, 578, 582, 588, 601, 602, 607, 609, 613, 620, 624, 634, 635, 643, 645, 664. 679. 694. 607. 609. 613. 620. 624, 634, 635, 643, 645, 664, 679, 694, 700, 706, 709, 711, 713, 722, 724, 732, 741, 742. 747. 748. 700. 706. 709. 711. 713, 722, 724, 732, 741, 742, 747, 748, 749, 754, 757, 759) which could have no other effect than to influence the jury prejudicially to the Appellant, Grene. In fact on several occasions the trial judge recognized this, and commented:

> "Mind you when I request attorneys to direct questions in a different way, that means nothing about my opinion of the case." (T8-527)

And further, the judge said:

> "Again, paying no attention to my criticism, because it means nothing except to keep this on an even keel." (TR-578)

Also in this cause the trial judge made objections for and on behalf of the prosecution.

> "What is the matter with you, Mr. District Attorney? He has gone all through a document and you don't even object to it. . . . ."
>
> "If Mr. Bates is not going to object, I will object. . . ." (TR-158)

And on another occasion the trial judge said to Mr. Bates:

> "We are way out of the direct. I do not know what we are doing here. Why don't you object." (TR-356)

A further review of the transcript of testimony will reveal an overwhelming number of questions and comments by the trial judge favorable to the prosecution, and which could only convey an impression to the jury that the judge believed the Appellant, Grene, to be guilty.

It is to be noted that Appellant recognizes that the trial judge must by virtue of his position act as a moderator so as to keep the trial flowing smoothly and that, therefore, he must interject himself into the trial on occasion.

It is further recognized that many of the comments in the instant cause standing naked would not constitute harmful error. However, the cumulative content of the overwhelming number of comments and questions favorable to the prosecution in the instant cause did not, and could not afford to the Appellant, Grene, a fair and impartial trial under the law. The action of the trial judge, inadvertent though it was, had no other effect than to convey to the jury an impression that the judge believed the Appellant, Grene, to be guilty as charged. This result deprived Appellant, Grene, of a fair trial and due process of law as guaranteed by Amendments V and VI of the Constitution of the United States.

POINT III.

WHETHER OR NOT, WITH RESPECT TO COUNTS I AND II, THE GOVERNMENT PROVED THE APPELLANT, GRENE, GUILTY OF THE CHARGES BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT WHEN THE ONLY EVIDENCE PRESENTED WAS PURELY CIRCUMSTANTIAL.

This is a case of "guilt by association." The record in this cause is devoid of any testimony which directly or indirectly shows that the appellant, Grene, had any knowledge that the money orders involved in the fiancing of the Brazilian land development deal, a project Appellant, Grene, had been working on for some time prior to the appearance of the Defendants, Napoli and Rosa, upon the scene, were stolen, forged or were anything other than valid money orders. The record shows that Appellant, Grene was acting as an agent on behalf of Reames for the limited purpose of procuring investors and developers, and it was for this sole purpose he introduced Napoli and Aosa to Reames. If there is even a scintilla of evidence in this cause against the Appellant, Grene, which could, by some stretch of the imagination connect him with the charges set forth in the indictment, it is purely circumstantial and does not exclude every reasonable hypothesis consistent with his innocence as required by law.

This Circuit has consistently held that circumstantial evidence will not sustain a conviction unless every reasonable hypothesis other than the guilt of the defendant is excluded.

Bryan v. *United States,* 5th Circuit, 175 M2d 223, aff'd 336 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335, rehearing denied 336 U.S. 957, 70 S. Ct. 491, 94 L. Ed. 590

Also,

Crane v. *United States,* 5th Cir., 148 F2d 615

The test in circumstantial evidence cases is whether the inferences which could have been reasonably drawn from the evidence were not only consistent with guilt, but whether they were inconsistent with every reasonable hypothesis of innocence.

Williamson v. *United States,* 5th Cir., 332 F2d 125

The testimony of two (2) accomplices, Robert Savage and Harley Reames, is the only possible scintilla of evidence which could raise any inference with respect to the participation of Appellant, Grene, in the alleged crimes. And, even as to this testimony, the witnesses were contradictory in their statements concerning Appellant, Grene, and his participation (TR-215, 279) and were refuted by other witnesses. The testimony of the conspirator, Savage, as to Grene's knowledge was at best an assumption on his part not based on actual knowledge (TR-279), and even more important did not exclude every reasonable hypothesis consistent with the innocence of the Appellant Grene. In addition, after the conspirator, Harley Reames, had testified as to alleged conversations involving the Appellant, Grene, upon closer examination he testified that he was confused as to conversations and did not recall them (TR-121, 122, 123). Again the testimony showing a failure to exclude every reasonable hypothesis consistent with innocence.

With respect to the initial conversation between Reames and Rosa on the boat, the only testimony to show that Appellant, Grene, was present during the conversation was utterly and completely refuted by all witnesses. (TR-142, 150; TR-392; TR-570).

This Court has emphatically sustained the proposition that circumstances which raise a mere suspicion of guilt will not sustain a verdict of guilty.

> *Thomas* v. *United States*, 5th Cir., 239 F2d 7
> *Wise* v. *United States*, 5th Cir., 241 F2d 545

It has also been held that the mere fact that a person is seen in the vicinity of the commission of a crime is not sufficient evidence of his complicity in the said crime.

> *United States ex rel Argento* v. *Jacobs*, 176 F. Supp. 877

Again, this 5th Circuit Court of Appeals has held that to sustain a charge of conspiracy there must be proof beyond a reasonable doubt that each accused was connected with the conspiracy.

> *Knight* v. *United States*, 5th Cir., 279 F2d 675 cert. den'd 370 U. S. 923, 82 S. Ct. 1565, 8 L. Ed. 2d 503

In the case of *United States* v. *Ah Kee Eng*, supra, the court was faced with a situation wherein the defendant, Eng, met with two parties. He was asked by these parties if he would like to purchase heroin. Eng replied in the affirmative, agreeing to pay $1,000.00 for five packages. The two parties were arrested after this conversation, when they had the heroin in their possession, but before they sold the same to Eng. Eng was arrested and charged with the offense of conspiring to import heroin into the United States illegally. The Court held that there was absolutely no evidence to show that Eng knew that the heroin had been imported or that the parties he was dealing with were to bring the heroin into the country. Eng was never told where or how the heroin was obtained.

The Court stated that there was absolutely no testimony to show that Eng was involved in a conspiracy to import heroin into the United States illegally and his conviction could not stand.

We are here dealing with an analogous fact situation as that existing in the Eng case, supra. There is no evidence herein to show that Appellant, Grene, knew that the money orders were stolen, or were anything other than valid money orders. The record further reveals that the trial court herein recognized that Grene knew nothing of the transportation of the said money orders to Miami, striking that allegation from the conspiracy count of the indictment (TR-764; 768; 771).

Further, and in conclusion the trial court in this cause recognized the insufficiency of the evidence presented by Government in all counts against the Appellant, Grene (TR-765).

his right for an impartial trial, that the trial judge should have instructed the jury on the law concerning the weight to be afforded to the testimony of an alleged accomplice.

Under the circumstances of this case, more especially the evidence against Appellant, Grene, it was imperative and fundamental to his right for an impartial trial, that the trial judge should have instructed the jury on the law concerning the weight to be afforded to the testimony of an alleged accomplice.

This Court has oft times voiced the proposition that while a conviction may be based on the testimony of accomplices the judges should charge the jury concerning the fact that such testimony should be carefully scrutinized by the jury and they should be charged at to the weight to be given such testimony.

West v. *United States*, 5th Cir., 113 F2d 68, Cert. den'd, 311 U. S. 647, 61 S. Ct. 33, 85 L. Ed. 413
Peel v. *United States*, 5th Cir. 316 F2d 907
Lyles v. *United States*, 5th Cir. 249 F2d 744

The Court stated in:

Phelps v. *United States,* 5th Cir. 252 F2d 49, 52

"A skeptical approach to accomplice testimony is a mark of the fair administration of justice. . . . the fair administration of justice requires that if there is complice the jury should resolve the doubt and receive a reasonable doubt as to whether a witness is an ac- full instructions on the law of accomplice testimony, including a caution against placing too much reliance upon the testimony of an accomplice."

POINT IV.

WETHER OR NOT THE COURT COMMITTED FUNDAMENTAL ERROR IN MAILING TO INSTRUCT THE JURY ON THE LAW REGARDING THE WEIGHT TO BE AFFORDED TO THE TESTIMONY OF ADMITTED ACCOMPLICES.

It has been universally held that the evidence of an accomplice must be carefully crutinized by a jury and should be regarded with suspicion.

Surratt v. *United States,* 269 F2d 240 106 U. S. App. D. C. 49
McQuald v. *United States,* 198 F2d 987 91 U. S. App. D. C. 229, cert. den'd, 344 U. S. 929, 73 C. Ct. 499, 97 L. Ed. 715
Brickey v. *United States,* 8th Cir. 123 F2d 34
United States v. *Tarricone,* 2nd Cir. 242 F2d 555
Ward v. *United States,* 5th Cir., 296 898

In the instant case, the trial judge allowed the cause to go to the jury without any specific instructions on the law concerning the weight which the jury should afford to the testimony of an accomplice. It is respectfully submited that this failure of the trial judge constituted fundamental reversible error.

CONCLUSION

It is respectfully submitted that the cause herein and the conviction of the Appellant, Grene, should and must be reversed in order that justice prevail. The errors

which were committed in the trial of the Appellant, Grene, are so fundamental in nature that to allow his conviction to stand would be to fly in the face of the law and a travesty of justice.

The points argued in this brief reflect such fundamental error patent upon the face of the record that this Court must take cognizance of the fact that the Appellant, Grene was denied the due proces of law guaranteed to him by the Constitution of the United States, Amendment V.

Respectfully Submitted this 5th day of February, 1965.

Bernard Berman
Attorney for Appellant—Robert Grene
1440 79th Street Causeway
Miami Beach, Florida, 33141

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21049

VINCENT ROBERT NAPOLI, a/k/a JIMMY NAPOLI AND ROBERT GRENE, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ON CONSIDERATION OF THE APPLICATION OF the appellant Robert Grene in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant Robert Grene to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 2, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 2, 1965, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 2, 1965, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE,
Chief Judge.

Dated: (ORIGINAL FILED)

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1964

No. 21049

D. C. Docket No. 63-375-CR-EC

VINCENT ROBERT NAPOLI, a/k/a JIMMY NAPOLI AND ROBERT GRENE, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, GROOMS and MCRAE, District Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 3, 1965

ISSUED as Mandate: April 12, 1965

APPENDIX G

Constitution of the United States, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for the defense.

Title 18, United States Code Annotated, Section 2314, Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or articles Used in Counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be trans-

ported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87—371, § 2, 75 Stat. 802.

Title 18, United States Code Annotated, Section 371, Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punish-

ment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, United States Code Annotated, Section 473, Dealing in Counterfeit Obligations or Securities

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 705.

Title 18, United States Code Annotated, Section 2, Dealing in Principals

Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 205

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 341 F. 2d 916.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1965. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including June 1, 1965. The petition for a writ of certiorari was filed on June 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

779-747—65

QUESTIONS PRESENTED

1. Whether the evidence sustained petitioner's conviction.

2. Whether the district court abused its discretion in denying petitioner's request for a continuance.

3. Whether the district court's failure to instruct the jury specifically with regard to the weight to be given to the testimony of an accomplice constituted plain error.

STATUTES INVOLVED

18 U.S.C. 2314 provides in relevant part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *
>
> * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

18 U.S.C. 2311 provides in pertinent part:

As used in this chapter:

* * * * *

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest, or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

* * * * *

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all good, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner and two co-defendants were convicted of transporting in foreign commerce stolen securities having a value of more than $5,000, and conspiring to commit that offense, in violation of 18 U.S.C. 2314 and 371 (R. 805–810, 825). Petitioner was sentenced to imprisonment for a period of three years on the conspiracy charge and to one year on the substantive charge, the sentences to be served concurrently with each other and with a sentence previously imposed under another indictment (R. 847). The court of appeals affirmed.

Petitioner was indicted on July 3, 1963; he was arraigned and pleaded not guilty on July 10, 1963.[1] At that time, the court set the case for trial on July 22. Petitioner and his co-defendants applied for a continuance, which was denied (R. 816). The trial commenced on July 22, 1963. The evidence may be briefly summarized as follows:

On December 28, 1962, a quantity of money orders (whose serial numbers were shown) issued by the Travelers Express Co. and payable through the Clark State Bank of Clark, New Jersey, were stolen at Jersey City, New Jersey. The money orders were for no specified amount and were blank except for the facsimile signature of two officers of the company (R. 22–47).

[1] An earlier indictment making the same charges had been returned on February 1, 1963, against the two other defendants (Pet. App. 6a).

The principal government witness was Edward Reames, who stated that he was a dealer in foreign real estate. He testified that on January 1 or 2, 1963, petitioner came to his home at Miami Beach, Florida, and introduced defendants Rosa and Napoli (R. 58–60). Rosa said that he and Napoli had a million dollars in "travelers' checks" (as the witness expressed it) which they wanted to invest in Brazilian real estate and uncut diamonds. They assured Reames that the checks were valid and gave him a money order of the Travelers Express Co. for five dollars, which Reames took to a local bank and ascertained to be valid. It was arranged that Reames was to take $200,000 in these checks or money orders to Brazil, where he would exchange them for cruzeiros, with which he would buy land and diamonds. Later he was to receive $800,000 for the same purpose. It was agreed that he was to receive half the profits of the venture, forty percent of which he was to pay to petitioner as a "finder's fee" (R. 61–65, 117–123).

On the following evening, Reames and his son met with the defendants at a restaurant, where the plan was further discussed and arrangements were made for the payment of Reames' expenses to Rio de Janeiro and for the delivery of the $200,000 in money orders, which were to be placed in the trunk of Reames' car (R. 70–72, 124–125). Petitioner was active in this discussion, and he instructed how the money orders should be wrapped and handled (R. 125).

The money orders were placed in the trunk of Reames' car the following afternoon by Rosa and a man named Savage. Rosa gave Reames the balance of his expense money and also gave him $15,200 in one hundred bills which Reames was to keep in Rio de Janeiro until Rosa could join him (R. 74–76, 89–91, 127).[2]

Reames testified that he arrived in Rio de Janeiro on January 6 and learned there, for the first time, that the money orders amounted to $160,000, rather than $200,000 (R. 74–75, 83). He made a deal for the purchase of 75,000 acres of land, paying down $40,000 in the money orders. The balance he turned over for conversion into Brazilian currency. When he encountered difficulties in the conversion, Rosa arrived. The difficulties led Reames to take samples of the money orders and bills to the American embassy. He thereafter talked with Rosa, who admitted that the money orders were stolen and said that the conspirators in New York would be upset, because they were supposed to cash the checks and return to the United States before the checks cleared (R. 88–98).

Robert Savage, who had assisted in placing the money orders in Reames' trunk, testified on behalf of the government that he had filled in the blanks

[2] It was stipulated that the bills were counterfeit (R. 108–109). It was also charged both substantively and in the conspiracy count that petitioner knowingly transported these counterfeit Federal Reserve notes. The trial court held that the evidence did not sufficiently sustain these charges and withdrew them (R. 771, 776).

on the money orders with the name of a fictitious payee and with the amounts. He did this in the kitchen of Rosa's home and overheard several conversations, in which petitioner participated, about the purchase of land with the money orders (R. 199–206). The first group of money orders was delivered to the trunk of Reames' car (R. 212). There was over $800,000 in the second set (R. 207). These were recovered, partly at Rosa's home and partly from a locker at the Miami airport (R. 170–176, 113–115).

ARGUMENT

1. Under section 2311 of title 18, "value" is defined as "the face, par, or market value, whichever is the greatest" of the securities in question, and the statute prohibits their transportation in interstate or foreign commerce. Here the evidence showed petitioner's participation (1) in a conspiracy to transport money orders having a "face" value of approximately one million dollars and (2) in the actual transportation of money orders having a "face" value of $160,000 from Miami, Florida, to Rio de Janeiro, Brazil. The fact that at the time of the theft these documents were mere forms—blank except for the facsimile signatures by two officers of the issuing organization—is immaterial. At the time they were transported in foreign commerce they were "forged, counterfeited or spurious representations" of securities having a value well in excess of $5,000.

2. Petitioner does not suggest what pre-trial motions he would have filed had he been afforded more time to prepare for trial, nor does he claim that he

was deprived of necessary witnesses or prevented from gathering evidence. It is suggested by his present counsel that a more thorough review of the statute might have enabled trial counsel to raise the point discussed in paragraph 1, *supra*. However, that point was, we submit, frivolous in light of the clear statutory language defining "value" to include "face" value. Since the granting of a continuance is a matter for the sound discretion of the trial court (*Avery* v. *Alabama*, 308 U.S. 444; *Joseph* v. *United States*, 321 F. 2d 710, 713 (C.A. 9), certiorari denied, 375 U.S. 977) and no prejudice is shown to have resulted here, the denial of the requested continuance presents no issue warranting review by this Court.

3. Petitioner did not request an instruction on the weight to be given to the testimony of an accomplice. The court instructed the jury to "carefully scrutinize the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief" and to consider "any relation each witness may bear to either side of the case, the manner in which each witness might be affected, if they should be affected by the verdict." Immediately afterward the court inquired of counsel if any matter had been omitted, to which petitioner's counsel replied, "No, sir, we are satisfied, if your Honor please" (R. 799–800). The instructions given adequately covered the subject in the absence of any specific request. There was certainly no plain error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1965.